SUPREME QBE INSURANCE BERHAD

v.

FOO YIN TOH

HIGH COURT MALAYA, SEREMBAN
MUSTAPHA HUSSAIN J
[CIVIL APPEAL NO. 132-3-86]
22 JANUARY 1987

INSURANCE: *Motor car insured for RM15,000 - Excess clause of RM1,000 - Motor car stolen during currency of policy - Contract of indemnity - Question of amount payable to insured - Whether "market value" of car at time of loss or "insured value" - Market value assessed by insurers at RM10,000 - Basis of assessing "market value" - Policy of insurance not clearly defined - Basis of assessment.*

STATUTORY INTERPRETATION: *Question of construction - Ambiguity on terms of policy in assessing "market value" and payment of indemnity - Effect - Whose favour to be resolved - "Verba chartarum fortius accipiuntur contra proferentem" - Whether amount payable is "market value "or "insured value."*

The respondent, the registered owner of a Mercedes Benz car No. NH 2099 insured his motor car with the appellants under private motor car policy for one year from 16 August 1983 to 15 August 1984 whereby the appellants agreed to indemnify the respondent (insured) on the occurrence of some events to the motor car insured including theft of the motor car.

In the schedule of the policy under column "insured's estimate of value including accessories and spare parts" the amount given was RM15,000 including air-conditioner. Clause 2 under s. 1 of the policy states *inter alia*"... the insured's estimate of value stated in the schedule shall be the maximum amount payable by the company in respect of any claim for loss or damage."

During the currency of the policy of insurance on 20 February 1984, the respondent's car was stolen. The respondent asked the appellants to indemnify him to the value of RM15,000 for the loss of the car less RM1,000 being the excess clause. The appellants were prepared to pay only RM9,000 (after deducting the RM1,000 excess value). This amount was not acceptable to the respondent.

The respondent filed a civil action in the Sessions Court, Seremban, against the appellants claiming the sum of RM14,000 (after deducting the RM1,000 excess clause) in full settlement of the insured value of his lost car. However, the appellants by their statement of defence contended that the policy of insurance is a contract of indemnity and the amount recoverable under the policy is the amount of actual loss and not the insured value of the motor car. Therefore, they were liable to pay the respondent the market value of the car at the time of the loss. The learned President entered judgment in favour of the respondent for the sum of RM14,000 being the insured value of the car (less RM1,000 excess clause) with interest and costs of RM1,849. Hence, this appeal.

Held:

[1] The appellants had framed up the terms of contract and it is their language which is binding on them as well as on the insured, the respondent. It is therefore the bounden duty of the appellants to set out precisely and clearly as to how the value which they have to

indemnify is to be arrived at. If they had failed to do so, any ambiguity in the policy has to be resolved by adopting the construction favourable to the insured, the respondent - *'Verba chartarum fortius accipiuntur contra proferentem'*.

[2] In the absence of any clause to the effect that the payment of indemnity will be based on the "market value" of the car at the time of the loss and some precise indication of how this market value is to be assessed, the appellants must indemnify the insured, the insured value of the car at the time of the loss.

[Appeal dismissed with costs.]

Case referred to:
Pacific & Orient Insurance Sdn. Bhd. v. Woon Shee Min [1980] 1 MLJ 291

For the appellants - Tee Kim Chan; M/s. Shearn Delamore & Co.
For the respondent - James Ponniah; M/s. Stanley Ponniah, Ng & Soo

[Editor's Note: Appellants' appeal to the Supreme Court was dismissed with costs on 23.9.87 vide Civil Appeal No. 54/87 (Coram: Abdul Hamid CJ Malaya, Mohd. Azmi SCJ & Wan Hamzah SCJ).]

JUDGMENT

Mustapha Hussain J:

The respondent Foo Yin Toh, the registered owner of a Mercedes Benz car No. NH 2099 insured his car with the appellant's insurance firm under private motor car policy No. SIA 230001449 for one year from 16 August 1983 to 15 August 1984, whereby the appellants agreed to indemnify the respondent (insured) on the occurrence of some events to the vehicle insured including theft of the vehicle.

The policy of insurance is in agreed bundle p. 41 to p. 47 of the appeal record. Under column "insured's estimate of value including accessories and spare parts" in the schedule of the policy (at p. 47), the amount given is RM15,000 including air-conditioner. Clause 2 under s. 1 of the policy (p. 41) states *inter alia*:

> ... The insured's estimate of value stated in the schedule shall be the maximum amount payable by the company in respect of any claim for loss or damage.

There is also a RM1,000 excess claim clause.

It would then seem that the insured's car being stolen, the appellant company's liability to pay, at the maximum, is the amount stated in the schedule i.e., RM15,000 with the necessary implication from the word "maximum", that the amount payable could be less than RM15,000.

It came to pass on 20 February 1984, during the currency of the policy of insurance, the respondent's car was stolen, which was duly reported and the appellant insurance company was also notified of the theft.

The respondent then asked the appellant insurance company to indemnify him to the value of RM15,000 for the loss of the car (less RM1,000 excess clause which is not in dispute), the amount for which the car had been insured. However, the appellant insurance company was prepared to pay only RM9,000 (after deducting the RM1,000 excess value). The respondent contended that having insured the car for RM15,000, he was entitled to receive the actual insured value (less RM1,000 excess clause) and not any lesser amount. He then filed a civil

action in Sessions Court, Seremban claiming against the appellant insurance company RM14,000 (after deducting the RM1,000 excess clause) in full settlement of the insured value of his lost car.

The appellant insurance company in their statement of defence contended that the policy of insurance is a contract of indemnity and the amount recoverable under the policy is the amount of actual loss and **not the insured value of the car**. The appellant insurance company therefore contended that they are liable to pay the respondent **the market value of the car at the time of the loss.**

At the trial before the Sessions Court, the parties agreed that the only issue in dispute is the value the appellant insurance company is liable to pay. Only one witness gave evidence on behalf of the appellant insurance company. He is Mr. Lee Eng Eng, the sales manager of Cycle & Carriage, Kuala Lumpur, the main agents for Mercedes vehicles. In this evidence, this witness stated that in his opinion the value of the respondent's car was RM10,000. He said the value depended on many factors. The witness testified further that he had no opportunity to look at the car and so he gave 10% to 20% plus or minus on the value given by the owner. He also said that the value of the car would depend on how the owner looked after the car and because he had not seen the car, the value given by him was the general market value - (see p. 30 of the appeal record).

The learned President gave judgment in favour of the respondent and ordered the appellant insurance company to pay the respondent the sum of RM14,000 being the insured value of the car less RM1,000 excess clause, as claimed by him, with interest, and costs of RM1,849. This appeal by the appellant insurance company is against that decision of the learned President.

The learned President in his succinct grounds of judgment said that there was nothing mentioned in the policy of insurance that the appellant insurance company was only liable to pay the "market value" of the car at the time of its loss. He stated further that if the appellant insurance company wanted to take advantage of the policy, then they should state clearly the terms to that effect so that the respondent would know before he entered into the contract the actual terms. The learned President also said that in Clause 2 of s. I there was no mention of maximum liability. I cannot quite agree with this one finding alone of the learned President, as Clause 2 of the s. I of the said policy does mention of maximum liability, of which I have referred to earlier in this judgment. And the learned President said that there was no mention of the "market value" in the policy.

At the appeal only one ground was proffered, that is, the learned President erred in law for failing to consider that the policy was a contract of indemnity and not a valued policy.

Looking at the policy itself, the appellant insurance company will indemnify the insured (i.e. the respondent) against the loss of the insured vehicle. The insured's estimate of value of the car including accessories and spare parts and including air-conditioner was RM15,000. The date of the policy was 14 September 1983 and the period of coverage under the policy was between 16 August 1983 to 15 August 1984. The loss took place on 21 February 1984 i.e., six months and five days after the commencement of insurance. It is clear that the insurers has to indemnify the insured the value of the car on the date of loss. We do not know whether the car had been well looked after nor do we know whether any extra accessories had been fitted on the car. There is no evidence to this effect. But the insured (the respondent) insisted on his claim of RM15,000.

The evidence on behalf of the appellant insurance company is that the company had deducted 10% to 20% from the respondent's estimated value of RM15,000 in arriving at the market value of the car at the date of the loss. The witness had not seen the car and though he had experience as a sales manager, the value of depreciation given by him was purely conjecture.

It is true, as held by the Federal Court, in the case of *Pacific & Orient Insurance Sdn. Bhd. v. Woon Shee Min* [1980] 1 MLJ 291 that the maximum amount which the insurers can be called upon to pay is the estimated value of the car as stated in the policy and it does not follow that they will always be obliged to pay the whole amount even though the car is completely lost or destroyed. But the difficulty here is to find out what is the basis and how one goes about to arrive at the market value. Can one simply snatch from the air an arbitrary percentage figure of 10% to 20% without any basis? Why not 5% or 10%?

Looking at the brief evidence of the appellant insurance company's witness, the sales manager of Cycle & Carriage, the value depended on many factors and also on how the owner looked after his car and this witness had not seen the car in question at all. It is difficult to ignore that the value of RM10,000 this witness estimated was purely guesswork without any reasonable basis. On top of all this, there is nothing in the policy of insurance to suggest how the indemnity is to be worked out. The policy was prepared by the appellant insurance company and if the insurance company had not stated in clear and unmistakeable terms as to how the indemnity is to be arrived at, there is then an ambiguity in this respect. The appellant insurance company had framed up the terms of contract and it is their language which is binding on them as well as on the insured (the respondent). It is therefore the bounden duty of the appellant insurance company to set out precisely and clearly as to how the value which they have to indemnify, is to be worked out. If the appellant insurance company had failed to do so, any ambiguity in the policy has to be resolved by adopting the construction favourable to the insured, the respondent - *"Verba chartarum fortius accipiuntur contra proferentem"*.

Again looking at the policy of insurance as it stood, from the view point of a common layman in the street, he would have thought to himself - "I entered into a contract with the insurance company who promised to indemnify me RM15,000 if someone stole my car. I paid the premium to the insurance company on this promise. Surely, if my car is stolen, I expect the insurance company to indemnify me of this RM15,000, the insured value of the car."

But if there is a clause somewhere in the policy, let it be microscopic size, to the effect that the payment of indemnity will be based on the "market value" of the car at the time of the loss and some precise indication of how this "market value" is to be assessed, then and then only can the insurance company rely and pay the insured that "market value". In the absence of any such clause the insurance company must indemnify the insured the insured value of the car at the time of the loss.

The appeal is therefore dismissed with costs.

Also found at [1987] 2 CLJ 466